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THE SONG OF THE SIRENS—SANCTIONING LAWYERS UNDER 28 U.S.C. § 1927

Attorneys who abuse the litigation process contribute to rising litigation costs.¹ In an attempt to bring the costs home to those who create them, courts have become more willing to impose sanctions on attorneys who abuse the judicial process.² Although many federal statutes provide for economic sanctions against attorneys,³ this note

¹ See generally Levin & Colliers, *Containing The Cost of Litigation*, 37 *RUTGERS L. REV.* 219, 229, 231 (1985) (statistical analysis of costs and volume of litigation); see also Feirich, *Delays and the High Cost of Litigation: Some Thoughts About Alternatives*, 70 *ILL. B.J.* 738, 738-39 (1982); Grady, *Trial Lawyers, Litigators and Clients' Costs*, 4 *LITIGATION* 5, 5-7, 58 (1978); Haring, *Stemming the Tide of Litigation Costs*, 13 *BRIEF* 14, 14-16 (1983); Hufstедler & Nejejski, *A.B.A. Action Commission Challenges Litigation Cost and Delay*, 66 *A.B.A. J.* 965, 965-69 (1980); Middleton, *Judge Urges Cutting Needless Costs, Delays*, 68 *A.B.A. J.* 525, 525-26 (1982); Nejejski, *With Justice Affordable for All*, 19 *JUDGES' J.* 4, 4-9, 46 (1980).

² See, e.g., *In re TCI Ltd.*, 769 F.2d 441, 446 (7th Cir. 1985); see also Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 *N.C.L. REV.* 613, 619-53 (1983); Note, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 *U. CHI. L. REV.* 619, 623-29 (1977) [hereinafter Note, *Sanctions Imposed by Courts*].

³ See generally Joseph, *Rule 11 is Only the Beginning*, 1988 *A.B.A. J.* 62, 62-65 (1988).

Rule 11 of the Federal Rules of Civil Procedure requires that: "[e]very pleading, motion, and other paper of a party represented by an attorney shall be signed" by the attorney. *FED. R. CIV. P.* 11. The rule provides that this signature constitutes a certification that the signer has read the pleading, motion or paper and that to the best of his or her knowledge "after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose . . ." Rule 11 expressly authorizes a court to sanction any violator "upon motion or upon its own initiative" by assessing reasonable expenses incurred including a reasonable attorney's fee.

The scope of Rule 11 is limited to the initial signing of a pleading, motion, or paper, and therefore the attorney's conduct is judged at the time of signing only. *Oliveri v. Thompson*, 803 F.2d 1265, 1274 (2d Cir. 1986). The rule is only applicable to civil litigation filings in federal district court. It is not applicable to papers filed in connection with appeals, criminal cases, or bankruptcy proceedings. Joseph, *supra*, at 62; see also Maffei, *Rule 11—The Wrong Approach to Professionalism in Civil Litigation*, 73 *MASS. L. REV.* 98, 98-99 (1988); Schwarzer, *Sanctions Under The New Federal Rule 11—A Closer Look*, 104 *F.R.D.* 181, 184-85 (1985); Note, *Litigant Responsibility: Federal Rule of Civil Procedure 11 and Its Application*, 27 *B.C.L. REV.* 385, 385-406 (1986); Note, *The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Responsibility*, 61 *N.Y.U. L. REV.* 300, 322-25 (1986) [hereinafter Note, *Rule 11 Dynamics*]; Comment, *Ask Questions First and Shoot Later: Constraining Frivolity in Litigation Under Rule 11*, 40 *U. MIAMI L. REV.* 1267, 1288-94 (1986).

In contrast to Rule 11, Rule 38 of the Federal Rules of Appellate Procedure is a sanction applied at the appellate level to attorneys responsible for filing frivolous appeals. *FED. R. APP. P.* 38. The statute states that: "[i]f a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." *Id.* Courts apply an objective standard in assessing whether an appeal is frivolous under Rule 38. See *Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1201 (7th Cir. 1987); see also Joseph, *supra*, at

focuses on the imposition of sanctions against attorneys under section 1927 of the Judicial Code.⁴ Section 1927 authorizes sanctions against attorneys who "unreasonably and vexatiously" multiply the proceedings.⁵ The statute was first enacted in 1813,⁶ and was amended in 1980 specifically to add attorneys' fees to the list of possible sanctions.⁷ As a result of this amendment, courts have invoked this statute more frequently.⁸ The federal courts, however, evidence widely disparate views concerning the applicable standard for assessing whether an attorney has multiplied the proceedings "unreasonably and vexatiously" within the meaning of the statute.⁹ Some circuits impose a section 1927 sanction when an attorney's

62. Arguments "wholly without merit" are deemed frivolous, regardless of the absence of improper motive. *Natasha, Inc. v. Evita Marine Charters, Inc.*, 763 F.2d 468, 472 (1st Cir. 1985) (quoting *NLRB v. Catalina Yachts*, 679 F.2d 180, 182 (9th Cir. 1982)).

⁴ 28 U.S.C. § 1927 (1982), amended September 12, 1980, Pub. L. 96-349, Section 3, 94 Stat. 1156. Section 1927 of the Judicial Code, entitled *Counsel's liability for excessive costs*, reads: Counsel's Liability for excessive costs—Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

The statute was initially designed to reduce the litigiousness of the United States attorneys who were paid by the pleadings. *In re TCI, Ltd.*, 769 F.2d 441, 446 (7th Cir. 1985); see also *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759 n.6 (1980); H.R. CONF. REP. NO. 96-1234, 96th Cong., 2d Sess., reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 2716, 2782-83 [hereinafter HOUSE CONFERENCE REPORT]; Annotation, *What Conduct Constitutes Multiplying Proceedings Unreasonably and Vexatiously So As To Warrant Imposition of Liability on Counsel Under 28 U.S.C. Section 1927 For Excess Costs, Expenses, and Attorney Fees*, 81 A.L.R. FED. 36, 44 (1987).

⁵ 28 U.S.C. § 1927 (1982).

⁶ Ch. 14, Section 3, § 3 Stat. 21 (1813). See Note, *Sanctions Imposed by Courts*, *supra* note 2, at 623. When first enacted in 1813, the statute read:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

Id.

⁷ HOUSE CONFERENCE REPORT, *supra* note 4, at 2782.

⁸ *Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987). The courts' recent willingness to impose sanctions against attorneys under this statute has been traced to the 1983 amendment to Rule 11. Joseph, *supra* note 3, at 62. According to Joseph's theory, the courts' increased use of the amended Rule 11 (holding attorneys personally accountable for their pleadings, motions and papers and placing an affirmative duty on judges to order sanctions for violations) has resulted in a rediscovery and increased use of 28 U.S.C. § 1927. *Id.*

⁹ See *infra* notes 29-113 and accompanying text for a discussion of the various standards utilized by the federal courts.

conduct is merely negligent, while other circuits require a showing of reckless conduct or conduct evidencing willful bad faith.¹⁰

This note analyzes the various standards that the circuit courts use in order to determine whether an attorney has multiplied the proceedings "unreasonably and vexatiously" within the meaning of 28 U.S.C. § 1927. Section I of this note investigates the scope of the statute.¹¹ Section II reviews the standards that the circuit courts currently use.¹² Section III analyzes these standards in light of the ability of each standard to achieve the goals of the statute.¹³ This note proposes two standards. One standard is proposed for objectively colorable claims, claims that are well grounded in fact and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. A more stringent standard is proposed for claims that are not objectively colorable.¹⁴ For objectively colorable claims, the standard proposed for assessing whether an attorney's conduct multiplies the proceedings "unreasonably and vexatiously" is a standard that requires a showing of willful bad faith. For objectively noncolorable claims, a standard that requires a showing of reckless conduct is proposed.

I. SCOPE OF 28 U.S.C. § 1927

Section 1927 of the Judicial Code, entitled *Counsel's liability for excessive costs*, reads:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.¹⁵

The statute applies to all proceedings in federal courts of all levels.¹⁶ Congress intended the statute to discourage dilatory liti-

¹⁰ *Id.*

¹¹ See *infra* notes 15-27 and accompanying text for a discussion of the scope of 28 U.S.C. § 1927.

¹² See *infra* notes 29-113 and accompanying text for a discussion of the various standards utilized by the federal courts.

¹³ See *infra* notes 114-28 and accompanying text for a discussion of the ability of the standards to effectuate the goals of the statute.

¹⁴ See text following note 128 for the proposed dual standard.

¹⁵ 28 U.S.C. § 1927 (1982).

¹⁶ See, e.g., *In re Ginther*, 791 F.2d 1151, 1156 (5th Cir. 1986) (civil case); *Wisconsin v.*

gation practices and advocacy designed to burden an opponent, without chilling aggressive litigation and good-faith assertions of colorable claims.¹⁷ Prior to the 1980 amendment, the statute referred only to "excess costs," which covered only such taxable costs as filing fees.¹⁸ The 1980 amendment expanded the category of expenses to include "excess costs, expenses and attorneys' fees," which broadened the range of expenses that a judge may require an attorney to satisfy personally.¹⁹

Section 1927 is penal in nature.²⁰ In the *House Conference Report* on section 1927, Congress recognized that strict construction is necessary so that the provision will in no way dampen the legitimate zeal of an attorney in representing his or her client.²¹ In addition, strict construction is necessary so as not to chill an attorney's creativity in putting forth novel and creative legal theories.²²

Persons liable under section 1927 include any attorney or other person admitted to conduct cases in any court of the United States or any territory of the United States.²³ The statute applies equally to attorneys representing the winning party and the losing party,

Glick, 782 F.2d 670, 673 (7th Cir. 1986) (criminal case); *In re Usoskin*, 56 Bankr. 805, 819 (E.D.N.Y. 1985) (bankruptcy proceeding).

¹⁷ HOUSE CONFERENCE REPORT, *supra* note 4, at 2782.

¹⁸ *Id.* Other taxable costs include: (1) fees of the clerk and marshal; (2) fees of the court reporter for all or any part of the stenographer's transcript necessarily obtained for use in the case; (3) fees and disbursements for printing and witnesses; (4) fees for exemplification and copies of papers necessarily obtained for use in the case; (5) docket fees under Section 1923 of Title 28; (6) compensation of court-appointed experts. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 757-58, (1980).

¹⁹ HOUSE CONFERENCE REPORT, *supra* note 4, at 2782.

Sanctions awarding attorneys' fees are an exception to the American Rule that requires each party to bear its own attorney's fees and legal costs. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247-57 (1975). The American Rule was originally designed to foster free access to the courts by freeing potential plaintiffs from the fear that they would be accountable for their opponents' legal fees if they were unsuccessful in their action. See Note, *Rule 11 Dynamics*, *supra* note 3, at 304. One criticism of the American Rule is that a wronged party cannot be made completely whole absent an award of legal expenses. See Mallor, *supra* note 2, at 616. In general, statutory exceptions to the American Rule are limited to situations where blameworthy conduct constitutes an abuse of the judicial process. See Green, *From Here To Attorney's Fees: Certainty, Efficiency, and Fairness In The Journey To The Appellate Courts*, 69 CORNELL L. REV. 207, 209-10 (1984).

²⁰ See, e.g., *Monk v. Roadway Express, Inc.*, 599 F.2d 1378, 1382 (5th Cir. 1979), *aff'd in relevant part sub nom.* *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980).

²¹ HOUSE CONFERENCE REPORT, *supra* note 4, at 2782.

²² See *Mone v. C.I.R.*, 774 F.2d 570, 574 (2d Cir. 1985) (court sanctioned appellant's attorney pursuant to section 1927 because appellant's attorney submitted a carelessly written brief based on arguments that were irrelevant to the appeal).

²³ 28 U.S.C. § 1927 (1982).

plaintiff's attorneys and defendant's attorneys.²⁴ Section 1927 creates liability only for excess costs, expenses, and attorneys' fees reasonably incurred because of unreasonable and vexatious multiplication of the proceedings.²⁵ The statute does not authorize the imposition of sanctions to reimburse a party for the ordinary costs of trial.²⁶

The most problematical aspect of section 1927 concerns the assessment of what type of conduct constitutes an "unreasonable and vexatious" multiplication of the proceedings. Whether an attorney has increased the costs "unreasonably and vexatiously" within the meaning of section 1927 depends upon whether the court determines that the phrase "unreasonable and vexatious" implies a bad faith or intentional misconduct requirement not explicit in the statutory language.²⁷ A review of the federal judicial circuits reveals that there is currently no uniform standard against which an attorney's conduct is measured in order to determine whether an attorney has multiplied the proceedings "unreasonably and vexatiously."

II. REVIEW OF THE LAW—CIRCUIT TREATMENT OF THE STANDARDS UTILIZED TO DETERMINE WHETHER AN ATTORNEY HAS MULTIPLIED THE PROCEEDINGS "UNREASONABLY AND VEXATIOUSLY"

This section reviews the different standards circuit courts use in assessing whether an attorney's conduct is sanctionable under section 1927. To facilitate the discussion that follows, this section reviews the circuit courts' treatment of the issue in a non-sequential order, grouping into subsections the circuits that utilize the same standard. The first subsection reviews the circuits that use a "negligent conduct" standard. The second subsection reviews the circuits that use a "willful bad faith" standard. The third subsection reviews the circuits that use a "reckless conduct" standard. The last subsection reviews a circuit that utilizes a combination of the "negligent conduct" standard and the "willful bad faith" standard.²⁸

²⁴ *Roadway Express v. Piper*, 447 U.S. 752, 762 (1980); see also Annotation, *supra* note 4, at 46 (circuit disagreement regarding whether section 1927 sanctions may be imposed against *pro se* litigants).

²⁵ 28 U.S.C. § 1927 (1982); see *United States v. Blodgett*, 709 F.2d 608, 610-11 (9th Cir. 1983).

²⁶ See *Blodgett*, 709 F.2d at 610-11.

²⁷ *Barnd v. City of Tacoma*, 664 F.2d 1339, 1343 (9th Cir. 1982).

²⁸ At present, there is insufficient case law from the First, Fourth, Eighth, Eleventh and Federal Circuits from which to determine what standard these courts utilize in assessing

A. *The Fifth and Sixth Circuits: Negligent Conduct Standard*

The Courts of Appeals for the Fifth and Sixth Circuits use a "negligent conduct" standard in assessing whether an attorney's conduct has multiplied the proceedings "unreasonably and vexatiously" within the meaning of 28 U.S.C. § 1927. Under this standard, the court may sanction an attorney whose negligent conduct multiplies the proceedings, thereby creating excess costs. Because negligent conduct alone is sufficient to warrant the sanction, it is irrelevant whether the attorney engaged in the negligent conduct for an improper purpose, such as to harass an opponent or cause a delay.

In the 1986 case of *Jones v. Continental Corp.*, the United States Court of Appeals for the Sixth Circuit reversed the district court's award of attorney fees and expenses against plaintiff-appellant's counsel pursuant to section 1927.²⁹ Although the court recognized that the Sixth Circuit had not previously construed the meaning of "unreasonable and vexatious," it held that section 1927 authorized a court to assess fees against an attorney for unreasonable and vexatious multiplication of litigation "despite the absence of any conscious impropriety."³⁰ According to the *Jones* court, when an attorney "knows or reasonably should know" that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims, a trial court does not err by assessing fees attributable to such actions against the attorney.³¹

whether an attorney's conduct is sanctionable under 28 U.S.C. § 1927. In *United States v. Nesglo, Inc.*, 744 F.2d 887, 892 (1st Cir. 1984) and *In re Oximetrix, Inc.*, 748 F.2d 637, 644 (Fed. Cir. 1984), the courts affirmed the district courts' award of section 1927 sanctions because bad faith was clearly present. In both cases, however, the courts failed to indicate whether bad faith was or was not a requirement for the imposition of section 1927 sanctions.

In *Limerick v. Greenwald*, 749 F.2d 97, 102 (1st Cir. 1984), the court affirmed the section 1927 sanction without adequate indication as to the standard the court employed. In *O'Connell v. Champion Int'l Corp.*, 812 F.2d 393, 395 n.2 (8th Cir. 1987), the court stated that the question of whether section 1927 required a finding of bad faith in addition to unreasonable conduct was not before the court. Similarly, in *Hashemi v. Campaigner Publications, Inc.*, 784 F.2d 1581, 1584 (11th Cir. 1986) and *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1510 (11th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986), both courts of appeals held that the district courts did not abuse their discretion in failing to award or in denying motions to award sanctions pursuant to section 1927. The courts, however, failed to indicate their reasons. In *Blair v. Shenandoah Women's Center, Inc.*, 757 F.2d 1435, 1438 (4th Cir. 1985), it is unclear what authority or statute the court relied on for the imposition of sanctions.

²⁹ 789 F.2d 1225, 1229-30 (6th Cir. 1986).

³⁰ *Id.* at 1230.

³¹ *Id.* The court perceived nothing in the record that could support a conclusion that Jones's counsel "knew or should have known" that failure to amend the pleadings would

The district court in *Jones* sanctioned the plaintiff's attorney for failing to amend a complaint after the defendant filed a motion for a more definite statement.³² The district court held that the complaint was deficient because it failed to specify whether section 1981 or Title VII was the basis for the sex discrimination claims, the claims against the individual defendants and the claim for \$1,000,000 in damages.³³ In reversing the trial court, the Sixth Circuit stated that the most cursory research would reveal that the plaintiff's attorney brought the sex discrimination claims under Title VII because section 1981 is not applicable to sex discrimination claims.³⁴ In addition, the court concluded that Jones's counsel was intentionally and properly seeking recovery against the individual defendants under both section 1981 and Title VII. The court also determined that the attorney's request for \$1,000,000 in damages was a damage claim pursuant to section 1981 because Title VII does not authorize general compensatory damages.³⁵ The court held that the defense counsel could have easily resolved these uncertainties without any significant expenditure of time, and therefore the failure of the plaintiff's attorney to clarify the complaint was not negligent conduct warranting a section 1927 sanction.³⁶

Elaborating on the negligent conduct standard, the *Jones* court stated that Congress did not intend the 1980 amendment, adding attorney fees, to require a finding of subjective "bad faith" because the courts already had the "inherent power" to assess sanctions against attorneys whose conduct evidenced bad faith.³⁷ The amended sanction, the court explained, aims to deter the pursuit of claims that are frivolous on the merits in addition to nonfrivolous claims pursued through the use of multiplicative litigation tactics that are harassing, dilatory, or otherwise "unreasonable and vexatious."³⁸

retain frivolous claims in the litigation or needlessly obstruct the litigation of nonfrivolous claims. *Id.* at 1230-31.

³² *Id.* at 1229 & n.3. The court of appeals noted that the defendant moved to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, rather than moving for a more definite statement pursuant to Rule 12(e). The court of appeals stated, however, that the record indicated that the district court treated the motion as brought under Rule 12(e). *Id.*

³³ *Id.* at 1231.

³⁴ *Id.*

³⁵ *Jones*, 789 F.2d at 1232.

³⁶ *Id.* at 1231-32.

³⁷ *Id.* at 1230.

³⁸ *Id.* at 1233.

In the 1987 case of *In re Ruben*, the Sixth Circuit reaffirmed the *Jones* test for determining whether an attorney's behavior warrants a section 1927 sanction.³⁹ The *Ruben* court remanded the issue of sanctions against plaintiff's counsel because the district judge failed to delineate clearly whether he imposed the sanction pursuant to section 1927, Rule 11 of the Federal Rules of Civil Procedure or the court's inherent power to punish bad faith conduct during litigation.⁴⁰ The *Ruben* court stated, however, that *Jones v. Continental Corp.* clarified that the standard for section 1927 determinations in the Sixth Circuit was an *objective* one, not requiring a finding of subjective bad faith.⁴¹ In clarifying this objective standard, the court stated that simple inadvertence or negligence that frustrates a trial judge will not support a sanction under section 1927 unless the attorney's conduct falls short of the obligations owed by a member of the bar to the court and as a result, causes additional expense to the opposing party.

The United States Court of Appeals for the Fifth Circuit has employed an objective negligent conduct standard as well. In the 1986 case of *McGoldrick Oil Co. v. Campbell, Athey & Zukowski*, the court of appeals assessed sanctions against the appellant's attorney under 28 U.S.C. § 1927 because the court determined that the appeal was frivolous.⁴² After reviewing the record, the court of appeals noted that there was never any justiciable dispute between the parties.⁴³ McGoldrick's attorney requested documents from Campbell, Athey & Zukowski (CAZ), and CAZ offered the attorney an opportunity to copy them. McGoldrick's attorney initially accepted the offer, and then subsequently rejected it without explanation. McGoldrick's attorney filed a complaint to compel production of these documents.

The Court of Appeals for the Fifth Circuit held that the complaint was properly dismissed on CAZ's unopposed motion for summary judgment.⁴⁴ The district court had imposed sanctions against McGoldrick and his attorney because the complaint had no merit.⁴⁵

³⁹ 825 F.2d 977, 984 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1105 (1988).

⁴⁰ *Id.* at 981, 991. Dicta in *Ruben* indicates that proceeding to trial upon inadequate evidence may lead to a sanction under section 1927 and failure to appear for trial may, in a proper case, result in a section 1927 sanction as well, unless co-counsel is present. *Id.* at 989 n.11, 990 n.13.

⁴¹ *Id.* at 984.

⁴² 793 F.2d 649, 653 (5th Cir. 1986).

⁴³ *Id.*

⁴⁴ *McGoldrick*, 793 F.2d at 652-53.

⁴⁵ *Id.* at 652.

McGoldrick filed an appeal for reconsideration of the dismissal and the sanctions. The court of appeals held that the appeal was frivolous because it was devoid of merit.⁴⁶ The court of appeals assessed an additional \$2,000 sanction against McGoldrick's attorney, pursuant to section 1927 and Rule 38 of the Federal Rules of Appellate Procedure, for filing a frivolous appeal.⁴⁷

In summary, the Courts of Appeals for the Fifth and Sixth Circuits utilize a "negligent conduct" standard in assessing whether an attorney's conduct has multiplied the proceedings "unreasonably and vexatiously" within the meaning of 28 U.S.C. § 1927. Under this objective standard, the courts may sanction an attorney if his or her negligent conduct multiplies the proceedings, thereby creating excess costs. Whether the attorney behaved in a negligent manner for an improper purpose, such as to harass the opponent or cause a delay, is irrelevant under the "negligent conduct" standard.

B. *The Second and Third Circuits: Willful Bad Faith Standard*

The Courts of Appeals for the Second and Third Circuits utilize a "willful bad faith" standard in assessing whether an attorney's conduct has multiplied the proceedings "unreasonably and vexatiously" within the meaning of 28 U.S.C. § 1927. Under this standard, a court may sanction an attorney for multiplying the proceedings only when there is evidence that the attorney willfully engaged in behavior that multiplied the proceedings, thereby creating excess costs. Circuits using this standard require a clear showing of bad faith.

In the 1985 case of *Baker Industries v. Cerberus Ltd.*, the United States Court of Appeals for the Third Circuit reviewed the district court's award of attorney's fees under section 1927 and held that willful bad faith is a prerequisite to the imposition of section 1927 sanctions.⁴⁸ In *Baker*, the parties agreed with the suggestion of the district court to refer their patent licensing dispute to a referee.⁴⁹ The parties also agreed that the referee's conclusions of law and fact would be binding on both parties, without the possibility of court review. The defendant's attorney, however, filed objections in the district court to the referee's legal conclusions. The district court

⁴⁶ *Id.* at 653.

⁴⁷ *Id.* at 654.

⁴⁸ 764 F.2d 204, 209-212 (3d Cir. 1985).

⁴⁹ *Id.* at 206-07.

ordered the defendant's attorney to pay the plaintiff's legal fees and costs incurred as a result of the objections.⁵⁰

The Third Circuit affirmed, stating that the conduct of the defendant's attorney following the referee's determination constituted "willful bad faith" because it was a flagrant breach of the agreement to be bound by the referee's determination.⁵¹ Although the *Baker* court recognized that section 1927 does not speak explicitly in terms of bad faith, the court concluded that a bad faith finding is a precondition to the imposition of attorneys' fees under section 1927.⁵² In addition, the court stated that there must be a finding of "willful" bad faith on the part of the offending attorney.⁵³ The court of appeals stated that a court should not sanction an attorney for a mistake in professional judgment because section 1927 requires *unreasonable* conduct.⁵⁴

In the 1986 case of *Ford v. Temple Hospital*, the Third Circuit reaffirmed the position adopted in *Baker* that a finding of willful bad faith is necessary before section 1927 sanctions may be imposed on an attorney.⁵⁵ In *Ford*, the Equal Employment Opportunity Commission had issued to the plaintiff and her attorney, on February 14, 1984, a notice of the right to sue Temple Hospital and the union pursuant to a Title VII action alleging racial discrimination.⁵⁶ Appellant's attorney filed the Title VII action on May 31, 1984. In August of that year, plaintiff's counsel received notice from the defendants that the action might be barred because it had been filed after the allowable ninety day period. The letter stated that the defendants might seek to recover attorney fees and costs if the action was not terminated.

The defendants filed a motion for summary judgment in October, 1984.⁵⁷ At the summary judgment hearing, the district court rejected the plaintiff's arguments for tolling the statute of limitations, and the plaintiff did not file an appeal from this action. Thereafter, the defendants filed motions for attorney fees, and the district court granted the motion for sanctions pursuant to section 1927.⁵⁸ The court also granted motions for sanctions pursuant to

⁵⁰ 570 F. Supp. 1237, 1259 (1983).

⁵¹ *Baker*, 764 F.2d at 211.

⁵² *Id.* at 208.

⁵³ *Id.* at 209.

⁵⁴ *Id.*

⁵⁵ 790 F.2d 342, 346-47 (3d Cir. 1986).

⁵⁶ *Id.* at 344.

⁵⁷ *Id.*

⁵⁸ *Id.* at 346, 348.

the "bad faith exception" to the American Rule, a rule that requires each party to bear its own legal costs.⁵⁹ The district court stated that because bringing and maintaining the lawsuit was in bad faith, the court could make an exception to the American Rule.

The Third Circuit affirmed the portion of the award assessing sanctions for the subsequent maintenance of the suit after it had been established that the defendant had asserted an "unchallengeable" defense.⁶⁰ Although the court of appeals affirmed this portion of the district court's award, stating that the bad faith exception to the American Rule would support the award, the court did not specifically mention section 1927 in the holding.⁶¹ The *Ford* court discussed section 1927 at length, however, concurring with the Third Circuit decision in *Baker* that there must be a finding of willful bad faith before section 1927 sanctions may be imposed on an offending attorney.⁶² In elaborating on the definition of willful bad faith, the *Ford* court stated that some indication of an intentional advancement of a baseless contention that is made for an ulterior purpose, such as harassment or delay, would be sufficient to satisfy the section 1927 standard.

The United States Court of Appeals for the Second Circuit uses a similar standard. In the 1986 case of *Oliveri v. Thompson*, the Second Circuit reviewed the district court's assessment of attorney fees and costs against the plaintiff's attorney and concluded that a section 1927 sanction was not warranted because there was no clear showing of bad faith.⁶³ In *Oliveri*, three undercover police officers forcibly arrested the plaintiff for attempted criminal sale of heroin.⁶⁴ The district attorney's office subsequently offered to dismiss the charges if the plaintiff would release the county and its employees of any liability for the arrest. Although the plaintiff refused to sign the release, the district attorney dismissed the charges against him.

The plaintiff's attorney instituted an action against the three police officers, the police commissioner, the district attorney and Suffolk County for unconstitutional arrest, use of excessive force and other claims.⁶⁵ The jury concluded that the arrest was based

⁵⁹ *Id.* See *supra* note 19 and accompanying text for a discussion of the American Rule.

⁶⁰ *Ford*, 790 F.2d at 348, 350.

⁶¹ See *id.* at 350.

⁶² *Id.* at 347.

⁶³ 803 F.2d 1265, 1277-81 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

⁶⁴ *Id.* at 1268.

⁶⁵ *Id.* at 1276-79.

on probable cause and that none of the defendants had used excessive force at any time.⁶⁶ After the trial, the defendants made a joint motion for sanctions against the plaintiff's attorney under both 28 U.S.C. § 1927 and Rule 11 of the Federal Rules of Civil Procedure. The United States District Court for the Eastern District of New York awarded \$5,000 in attorney fees against plaintiff's attorney under both section 1927 and Rule 11,⁶⁷ based on the court's determination that the plaintiff's attorney instituted meritless claims and continued prosecution of those claims after it became apparent that the claims had no factual or legal basis.⁶⁸

The Second Circuit concluded that the lower court erred by imposing section 1927 and Rule 11 sanctions for instituting and continuing meritless claims because there was no clear showing of bad faith.⁶⁹ The court stated that in order to support a section 1927 sanction, the record must contain highly specific evidence of bad faith.⁷⁰ The *Oliveri* court concluded that there was insufficient evidence of bad faith because the record revealed that the plaintiff's attorney had a reasonable basis for believing that his client's claims were colorable.

According to the court of appeals, section 1927 requires a clear showing of bad faith similar to that necessary to invoke the court's inherent power to punish bad faith conduct during litigation.⁷¹ The court explained that a bad faith finding under both the inherent power and 28 U.S.C. § 1927 requires a finding of legal action taken for reasons of harassment or delay or other improper purpose.⁷² The court noted that the only meaningful difference between an award made under section 1927 and one made pursuant to the court's inherent power is that courts may assess section 1927 sanctions only against attorneys or other persons authorized to practice before the courts.⁷³ Courts, however, may assess sanctions under their inherent power against an attorney, a party, or both.

In summary, the Courts of Appeals for the Second and Third Circuits utilize a "willful bad faith" standard in assessing whether an attorney's conduct has multiplied the proceedings "unreasonably

⁶⁶ *Id.* at 1270.

⁶⁷ *Id.* at 1267-68.

⁶⁸ *Id.* at 1275.

⁶⁹ *Id.* at 1277, 1281.

⁷⁰ *Id.* at 1277.

⁷¹ *Id.* at 1273.

⁷² *Oliveri*, 803 F.2d at 1272.

⁷³ *Id.* at 1273.

and vexatiously" within the meaning of 28 U.S.C. § 1927. Under this subjective standard, a court may sanction an attorney for multiplying the proceedings only when there is evidence that the attorney willfully engaged in behavior that multiplied the proceedings, thereby creating excess costs.

C. *The Ninth, Tenth and District of Columbia Circuits: Reckless Conduct Standard*

The Ninth, Tenth and D.C. Circuits utilize a "reckless conduct" standard in assessing whether an attorney's conduct has multiplied the proceedings "unreasonably and vexatiously" within the meaning of 28 U.S.C. § 1927. Under this standard, a court may sanction an attorney for reckless behavior that multiplies the proceedings, creating excess costs. In addition to reckless behavior, behavior motivated by willful bad faith is likewise sanctionable under this standard.

In the 1986 case of *Reliance Insurance Co. v. Sweeney Corp.*, the United States Court of Appeals for the District of Columbia Circuit held that an attorney may be sanctioned under section 1927 if the attorney's conduct reflects a *reckless* indifference to the merits of a claim.⁷⁴ In *Reliance*, the district court confirmed an arbitration award for \$241,000 that Century Construction Company owed to its subcontractor Sweeney Corporation.⁷⁵ Sweeney filed a summary judgment motion against Reliance Insurance Company, claiming that Reliance was liable for the award because Reliance had guaranteed the contractor's payments to the subcontractor. Reliance filed a conclusory opposition to the motion, arguing that the arbitration award covered items beyond the scope of the suretyship agreement. Reliance's opposition to the motion did not set forth specific facts to show that summary judgment would be premature, contrary to the requirements for opposing summary judgment motions outlined in Rule 56(e) of the Federal Rules of Civil Procedure. The district court granted summary judgment against Reliance and Reliance appealed.⁷⁶

The District of Columbia Circuit affirmed the summary judgment order after concluding that Reliance's attorney was unable or unwilling to advance any facts or legal arguments in Reliance's

⁷⁴ 792 F.2d 1137, 1138 (D.C. Cir. 1986).

⁷⁵ *Id.* at 1138.

⁷⁶ *Id.* at 1138-39.

favor.⁷⁷ The court of appeals stated that the appellant's claims were frivolous, and the court order requested Reliance and/or its counsel to show cause as to why they should not be held accountable for the expenses incurred by appellee in defending the appeal.⁷⁸ Neither the appellant nor his counsel responded to the request, and the court subsequently held both parties jointly liable for \$5,220 in appellee's attorney fees.⁷⁹

The court of appeals issued an amended opinion to explain the propriety of the section 1927 sanction.⁸⁰ The court explained that, although the language of section 1927 suggests deliberate misbehavior, subjective bad faith is not necessary.⁸¹ According to the *Reliance* court, an attorney may be held accountable for conduct that reflects a *reckless* indifference to the merits of a claim.⁸²

The United States Court of Appeals for the Tenth Circuit uses a reckless conduct standard as well. In the 1987 case of *Braleley v. Campbell*, the court stated that section 1927 sanctions are appropriate when an attorney's conduct manifests either intentional or *reckless* disregard for the attorney's duties to the court.⁸³ In *Braleley*, plaintiff-appellant Braleley brought an action in the United States District Court for the District of Kansas, seeking damages and injunctive relief against a municipal hospital and others.⁸⁴ The court entered summary judgment in favor of the defendants, and the plaintiff appealed. In an unpublished order and judgment issued by a panel of the United States Court of Appeals for the Tenth Circuit, the panel held that the plaintiff's appeal was frivolous and vexatious.⁸⁵ The appeal was frivolous and vexatious, the court explained, because the plaintiff's appellate brief did not set forth a statement of the issues that the plaintiff wished the court to address,

⁷⁷ *Id.* at 1139.

⁷⁸ *Id.* at 1137.

⁷⁹ *Id.*

⁸⁰ *Id.* at 1137-38.

⁸¹ *Id.* at 1138. In *Reliance*, however, the court determined that subjective bad faith did exist because neither Reliance nor its counsel responded to the court order to show cause as to why they should not be sanctioned. *Id.* at 1137. The court concluded that, despite numerous chances to present colorable claims at both the district and appellate courts, neither Reliance nor its counsel gave the court any reason to believe that the appeal was brought for any purpose other than to harass and delay. *Id.* at 1139. Thus, while the D.C. Circuit requires, at a minimum, conduct evidencing a reckless indifference to the merits of a claim, bad faith conduct is also sanctionable.

⁸² *Reliance*, 792 F.2d at 1138.

⁸³ 832 F.2d 1504, 1512 (10th Cir. 1987).

⁸⁴ *Id.* at 1504.

⁸⁵ *Id.* at 1507.

contrary to the requirements of Rule 28(a)(2) of the Federal Rules of Appellate Procedure.⁸⁶ In addition, the court observed that the argument section of the plaintiff's brief likewise did not clarify the issues for appeal.

The court sanctioned the plaintiff's attorney pursuant to section 1927 and Rule 38 of the Federal Rules of Appellate Procedure.⁸⁷ The case was remanded to assess the amount of the sanction.⁸⁸ In an en banc hearing, the court of appeals vacated the sanctions against the attorney, however, because the panel order imposed the sanctions without giving the attorney notice and opportunity to be heard.⁸⁹

Although the *Braley* court vacated the sanctions, it denied that a finding of subjective bad faith was a prerequisite for the imposition of section 1927 sanctions.⁹⁰ The court explained that such a subjective standard would be difficult to apply.⁹¹ According to the Tenth Circuit, a court may impose section 1927 sanctions against an attorney for conduct that manifests either intentional or *reckless* disregard for the attorney's duty to the court.⁹²

The United States Court of Appeals for the Ninth Circuit adopted a similar standard. In the 1982 case of *Barnd v. City of Tacoma*, the court held that a finding of intent, *recklessness* or bad faith is a prerequisite to the imposition of section 1927 sanctions.⁹³ In *Barnd*, the defense attorney referred to the plaintiff's prior arrests during his opening statement to the jury.⁹⁴ The judge declared a mistrial and assessed section 1927 sanctions against the defense attorney.

On appeal, the Ninth Circuit reviewed the issue of whether the language "unreasonable and vexatious" implies a bad faith or intentional misconduct requirement not explicit in the statute.⁹⁵ The fact that defense counsel referred to plaintiff's prior arrests during his opening statement to the jury, which resulted in a mistrial, was not by itself sufficient to affirm the lower court's sanction against

⁸⁶ *Id.* at 1508 n.2.

⁸⁷ *Id.* at 1507.

⁸⁸ *Id.* at 1507-08.

⁸⁹ *Id.* at 1515.

⁹⁰ *Id.* at 1512.

⁹¹ *Id.*

⁹² *Id.*

⁹³ 664 F.2d 1339, 1343 (9th Cir. 1982).

⁹⁴ *Id.* at 1340.

⁹⁵ *Id.* at 1343.

the attorney.⁹⁶ The court, however, stated that the most appropriate standard for assessing whether an attorney's conduct was sanctionable under section 1927 was the standard requiring a finding of "intent, *recklessness* or bad faith."⁹⁷ The court of appeals in *Barnd* concluded that a court could not assess sanctions against defense counsel under section 1927 without additional findings of fact as to whether defense counsel acted *recklessly* or in bad faith.⁹⁸

In the 1986 case of *Soules v. Kauaians for Nukoli Campaign Committee*, the United States Court of Appeals for the Ninth Circuit elaborated on the recklessness standard set out in *Barnd*.⁹⁹ In *Soules*, the district court imposed the section 1927 sanction after determining that the appellant's opposition to the intervention of an interested third party was frivolous and vexatious.¹⁰⁰ The Ninth Circuit reversed the imposition of the section 1927 sanction because the record contained inadequate evidence of the plaintiff's bad faith or recklessness.¹⁰¹ The court stated that section 1927 sanctions require that the attorney's conduct be in bad faith, and that bad faith is present when an attorney "knowingly or *recklessly*" raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent.¹⁰² In the Ninth Circuit, the court observed that the "bad faith" standard includes "recklessness."¹⁰³ Therefore, the district court's order imposing sanctions under section 1927 was reversed because the record lacked sufficient evidence of bad faith or recklessness.

In summary, the Ninth, Tenth and D.C. Circuits utilize a "reckless conduct" standard in assessing whether an attorney's conduct has multiplied the proceedings "unreasonably and vexatiously" within the meaning of 28 U.S.C. § 1927. Under this standard, a court may sanction an attorney for reckless behavior that multiplies the proceedings, thereby creating excess costs. Although reckless-

⁹⁶ *Id.* at 1340, 1343.

⁹⁷ *Id.* at 1343.

⁹⁸ *Id.*

⁹⁹ 849 F.2d 1176, 1185-86 (9th Cir. 1988).

¹⁰⁰ *Id.* at 1185.

¹⁰¹ *Id.* at 1186. The *Soules* court did not define recklessness. In *United States v. Blodgett*, the Court of Appeals for the Ninth Circuit stated that the mere fact that an appeal was frivolous did not establish the recklessness necessary to establish bad faith. 709 F.2d 608, 610 (9th Cir. 1983). The court stated, however, that filing a frivolous appeal solely for the purpose of creating a delay constituted behavior that is sanctionable under section 1927. *Id.*

¹⁰² *Soules*, 849 F.2d at 1185-86.

¹⁰³ *Id.* at 1185.

ness is sufficient to warrant a section 1927 sanction, willful bad faith is likewise sanctionable under this standard.

D. *The Seventh Circuit: A Dual Standard*

The United States Court of Appeals for the Seventh Circuit utilizes two standards for assessing whether an attorney's conduct warrants a section 1927 sanction. A "negligent conduct" standard is applied when the court determines that the claim is not objectively colorable. The court applies a "willful bad faith" standard to objectively colorable claims.

In the 1985 case of *In re TCI Ltd.*, the United States Court of Appeals for the Seventh Circuit reviewed a section 1927 sanction imposed by the bankruptcy court against TCI's attorney.¹⁰⁴ The bankruptcy court imposed an \$8,000 fine against the attorney to cover costs incurred by the opposing party in defending against two amended complaints that the court dismissed for failure to state a claim.¹⁰⁵ The district court affirmed, without assessing additional costs.¹⁰⁶ The Seventh Circuit also affirmed the \$8,000 fine and imposed an additional \$1,000 fine for delay damages pursuant to Rule 38 of the Federal Rules of Appellate Procedure.¹⁰⁷

In affirming the fine imposed by the lower court, the Seventh Circuit fashioned a dual standard for assessing whether an attorney's conduct has multiplied the proceedings "unreasonably and vexatiously" within the meaning of section 1927.¹⁰⁸ For objectively *noncolorable* claims, the *TCI* court adopted the standard set out in the amended Rule 11 of the Federal Rules of Civil Procedure.¹⁰⁹ Under this standard, a court may sanction an attorney if a complaint filed by an attorney is not warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law. The court stated that conduct was objectively unreasonable and vexatious when a lawyer pursued a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound.¹¹⁰ According to the court, a lawyer engaged in bad

¹⁰⁴ 769 F.2d 441, 445 (7th Cir. 1985).

¹⁰⁵ *Id.* at 443-45.

¹⁰⁶ *Id.* at 445, 449.

¹⁰⁷ *Id.* at 450.

¹⁰⁸ *Id.* at 445, 447.

¹⁰⁹ *Id.* at 447.

¹¹⁰ *Id.* at 445.

faith by acting recklessly or with indifference to the law, as well as by acting in bad faith within the bounds of what he or she knows to be the law. A lawyer's indifference to the law, the court concluded, may pose substantial costs on the adverse party, and section 1927 permits a court to force the attorney to bear those costs.

When a claim was objectively *colorable*, however, the *TCI* court stated that subjective bad faith or malice was a prerequisite for imposition of the section 1927 sanction.¹¹¹ As an example, the court stated that a lawyer who pursued a plausible claim for the sole purpose of inflicting additional costs on the opposing party would be guilty of abuse of the judicial process. Even those who prevail on the merits may be liable for fees, the court held, if in bad faith they caused their opponent to bear excessive costs.¹¹² The court reasoned that the best way to control unjustified tactics in litigation was to ensure that those who created the costs also bore them.¹¹³

In summary, the Seventh Circuit utilizes a dual standard in assessing whether an attorney's conduct has multiplied the proceedings "unreasonably and vexatiously" within the meaning of section 1927. Under this dual standard, the Seventh Circuit applies a "negligent conduct" standard to objectively noncolorable claims, but applies a "willful bad faith" standard to objectively colorable claims.

III. ANALYSIS OF THE STANDARDS USED BY THE COURTS OF APPEALS AND A PROPOSED DUAL STANDARD

The ideal standard for determining whether an attorney's conduct warrants the imposition of a section 1927 sanction is a standard that effectively fosters the congressional goals of the statute while minimizing potential adverse consequences.¹¹⁴ The goals of section 1927 are twofold: to punish the offender for wasting the court's time and resources by expanding the range of increased expenses that a judge may assess against an offending attorney, and to deter unnecessary delays in litigation¹¹⁵ and abuse of court processes.¹¹⁶

¹¹¹ *Id.*

¹¹² *Id.* (quoting *Lipsig v. National Student Mktg. Corp.*, 663 F.2d 178, 182 (D.C. Cir. 1980)).

¹¹³ *TCI*, 769 F.2d at 446.

¹¹⁴ See *infra* notes 122-28 and accompanying text for a discussion of these standards in relation to the goals of 28 U.S.C. § 1927 and the potential dangers inherent in the application of these standards to the statute.

¹¹⁵ HOUSE CONFERENCE REPORT, *supra* note 4, at 2782.

¹¹⁶ *Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

As the Seventh Circuit Court of Appeals observed in *In re TCI Ltd.*, bringing costs home to those who create them is possibly the best way to control unjustified tactics in litigation.¹¹⁷

Statutes purporting to effectuate the goals of punishment and deterrence, however, may create unintended and undesirable consequences for both the attorney and the legal profession. As the *House Conference Report* recognized, a statute sanctioning attorney conduct may chill an attorney's legitimate ethical obligation to represent a client zealously.¹¹⁸ In addition, such sanctions might discourage an attorney's creativity by discouraging good faith assertions of novel or innovative legal theories.¹¹⁹ The optimal standard, therefore, will accomplish the goals of punishment and deterrence while avoiding the adverse consequences of chilling attorney zeal and discouraging attorney creativity.¹²⁰ This section analyzes the three different standards for assessing whether an attorney's conduct is sanctionable under section 1927.¹²¹

A. The "Negligent Conduct" Standard

Under the "negligent conduct" standard, an attorney's conduct may multiply the proceedings "unreasonably and vexatiously" even though the attorney is not aware that the conduct is improper and even though the attorney has no improper purpose¹²² for engaging in such conduct.¹²³ Under this standard, culpability attaches when the attorney's behavior deviates from the standard of a reasonably competent attorney. The "negligent conduct" standard fosters the goal of punishing an attorney whose conduct multiplies the court

¹¹⁷ *In re TCI Ltd.*, 769 F.2d 441, 446 (7th Cir. 1985).

¹¹⁸ HOUSE CONFERENCE REPORT, *supra* note 4, at 2782.

¹¹⁹ See *Mone v. C.I.R.*, 774 F.2d 570, 574 (2d Cir. 1985).

¹²⁰ See *supra* notes 114-17 and accompanying text for a discussion of the legislative goals of 28 U.S.C. § 1927.

¹²¹ See *infra* notes 122-28 and accompanying text for a discussion of these standards. Many authors have proposed different standards for assessing attorney liability in relation to various sanctions. See, e.g., Martineau, *Frivolous Appeals: The Uncertain Federal Response*, 1984 DUKE L.J. 845, 854-56 (objective and subjective standards, or intentional and negligent standards, applied to frivolous appeals); Case Comment, *Awards Of Attorneys' Fees Against Attorneys: Roadway Express, Inc. v. Piper*, 60 B.U.L. REV. 950, 962-68 (1980) (negligence, malice and intentional abuse standards applied to 28 U.S.C. § 1927); Note, *Rule 11 Dynamics*, 61 N.Y.U. L. REV. 300 (1986) (objective and subjective standards applied to Rule 11).

¹²² In this context, "improper conduct" and "improper purpose" refer to conduct and motivation that violate the disciplinary rules of the A.B.A. MODEL CODE OF PROFESSIONAL RESPONSIBILITY.

¹²³ See *supra* notes 29-35 and accompanying text for a discussion of the "negligent conduct" standard employed in the Fifth and Sixth Circuits.

proceedings and wastes the court's time. In addition, this objective standard has a high deterrent value, as it poses few of the problems of proof associated with a subjective intent standard. Under the "negligent conduct" standard, a court need not address whether the offending attorney was aware that his or her behavior was improper or whether he or she had an improper purpose for engaging in the conduct in question. The court need only determine whether the attorney's behavior deviated from the objective standard of the reasonably competent attorney.

More critically, however, the "negligent conduct" standard poses a great danger of chilling an attorney's legitimate zeal in representing a client by discouraging assertions of novel or innovative legal theories. When a claim is objectively colorable, uncertainty or inexperience would militate against taking a chance that one's conduct might not pass the "reasonably competent attorney" test, especially when advocating a novel legal theory. When a claim is objectively noncolorable, zealous representation is not warranted.

In addition, section 1927 must be strictly construed because it is penal in nature. The statute was originally enacted for the purpose of reducing the litigiousness of the United States attorneys who were paid by the pleadings.¹²⁴ Negligent behavior was not the type of conduct that the statute was enacted to deter. If Congress had intended the statute to sanction *any* behavior that multiplied the proceedings, it would not have been desirable to limit sanctionable behavior to "unreasonable and vexatious" behavior.

B. The "Willful Bad Faith" Standard

Conduct is sanctionable under the "willful bad faith" standard when an attorney multiplies the proceedings "unreasonably and vexatiously" for an improper purpose, such as to harass an opponent or cause needless delay.¹²⁵ Application of this standard yields a high correlation between *knowingly* wrongful behavior and punishment, as sanctions under this standard are only applied when an attorney has an improper purpose for engaging in the multiplicative and vexatious behavior. The deterrent value, however, is relatively low due to the inherent difficulties associated with proof of subjective intent.

¹²⁴ *In re TCI, Ltd.*, 769 F.2d 441, 446 (7th Cir. 1985).

¹²⁵ See *supra* notes 48-73 and accompanying text for a discussion of the "willful bad faith" standard employed in the Second and Third Circuits.

The adverse consequences of chilling attorney zeal and discouraging attorney creativity, however, are less likely to play a prominent role under this standard because an attorney's improper purpose for pursuing a claim does not constitute zealous representation within the bounds of the law. Nor is such behavior legitimized because an attorney is pursuing a novel or innovative legal theory. The willful bad faith standard, therefore, serves to impose a desirable chilling effect on attorney conduct motivated by improper purposes, such as harassment or delay.

C. *The "Reckless Conduct" Standard*

Under the "reckless conduct" standard, an attorney's conduct is sanctionable when the attorney multiplies the proceedings because he or she has acted recklessly (or in bad faith).¹²⁶ Although none of the circuits employing this "reckless conduct" standard have defined recklessness, the Model Penal Code states that a person acts recklessly when that person consciously disregards a known substantial and unjustifiable risk.¹²⁷ According to the Model Penal Code, a person who commits an offense willfully is more culpable than a person who commits an offense recklessly, and a person who commits an offense recklessly is more culpable than a person who commits an offense negligently.¹²⁸ Although a lawyer who consciously disregards a substantial and unjustifiable risk is not necessarily doing so for an improper purpose, consciously disregarding a known risk evidences more culpability than mere negligence.

The "reckless conduct" standard, therefore, provides for punishment of behavior that is less culpable than the behavior required under the "willful bad faith" standard. Deterrent value, on the other hand, is higher with the "reckless conduct" standard than under the "willful bad faith" standard, as a court need not prove the existence of a subjective bad faith intent under the "reckless conduct" standard.

The danger of chilling attorney zeal and discouraging attorney creativity is more acute under the "reckless conduct" standard than

¹²⁶ See *supra* notes 74-103 and accompanying text for a discussion of the "reckless conduct" standard employed in the Ninth, Tenth and D.C. Circuits.

¹²⁷ MODEL PENAL CODE § 2.02(2)(c) (Official Draft 1962).

¹²⁸ *Id.* at §§ 2.02(2)(a)-(d). In this section, entitled "General Requirements of Culpability," the Model Penal Code defines four degrees of culpability: purposely, knowingly, recklessly and negligently. A person who commits an offense purposely or knowingly is more culpable than a person who commits an offense recklessly. Likewise, a person who commits an offense recklessly is more culpable than a person who commits an offense negligently.

under the "willful bad faith" standard because the "reckless conduct" standard does not require the existence of an improper purpose. The court need only determine that the attorney consciously disregarded a substantial and unjustifiable risk. A court applying the reckless conduct standard, therefore, could impose the sanction without an inquiry into the attorney's subjective intent.

In addition, under the "reckless conduct" standard, the dangers of chilling attorney zeal and discouraging attorney creativity are less acute for objectively noncolorable claims than for objectively colorable claims. Chilling attorney zeal and discouraging attorney creativity is desirable when the claim is objectively noncolorable, because noncolorable claims by definition do not merit an attorney's zeal or creativity. Furthermore, applying the "reckless conduct" standard to noncolorable claims is in keeping with the strict construction required by this penal statute. Under this standard, an attorney would not be sanctioned for pursuing a noncolorable claim unless he or she consciously disregarded the risk that his or her behavior would multiply the proceedings, causing needless delay or excess costs. This element of awareness could be inferred from the attorney's level of prior experience, thereby minimizing the chilling effect on the inexperienced attorney.

D. *Proposed Dual Standard*

The most appropriate standard for assessing whether an attorney's conduct has multiplied the proceedings "unreasonably and vexatiously" within the meaning of 28 U.S.C. § 1927 is a dual standard. For objectively *noncolorable* claims, the "reckless conduct" standard is the most appropriate standard because unlike the "negligent conduct" standard, the "reckless conduct" standard does not seek to punish the inexperienced attorney for mere negligence. Rather it seeks to punish the attorney who consciously disregards the risk that his or her conduct will needlessly multiply the proceedings, resulting in increased costs.

In addition, the "reckless conduct" standard is preferable to the "negligent conduct" standard for objectively noncolorable claims because section 1927 is penal in nature and must therefore be strictly construed. Strictly construed, negligent conduct that multiplies the proceedings does not constitute "unreasonable and vexatious" behavior when the negligent conduct is coupled with no awareness of the impropriety of the conduct and no improper purpose for engaging in the conduct. The "reckless conduct" stan-

dard, by contrast, necessitates an awareness of the impropriety of the conduct and therefore more nearly equates culpable conduct with "unreasonable and vexatious" behavior.

The "reckless conduct" standard for objectively noncolorable claims is also more appropriate than the more stringent "willful bad faith" standard that requires proof of an improper purpose. In relation to noncolorable claims, it is a more appropriate standard than the "willful bad faith" standard because noncolorable claims are not recognized as meriting the court's attention, and therefore the court need not require a showing of bad faith in order to avoid chilling attorney zeal or creativity. In addition, noncolorable claims cause delay and needlessly increase the cost of litigation regardless of whether they are pursued for an improper purpose. As section 1927 seeks to deter conduct that results in needless delay and increased costs, an attorney who recklessly pursues a noncolorable claim is in a position to avoid these results. In addition, this standard avoids the problems of proof associated with the "willful bad faith" standard because, under the "reckless conduct" standard, the court is not required to ascertain whether the attorney had an improper purpose for engaging in the conduct in question.

For objectively *colorable* claims, the most appropriate standard for assessing whether an attorney's conduct multiplies the proceedings "unreasonably and vexatiously" is the "willful bad faith" standard. Before a court may impose a section 1927 sanction under this standard, the court must find that the attorney had an improper purpose for engaging in the conduct. In light of the importance placed on zealous representation within the adversary system, this stringent standard works most effectively within the context of objectively colorable claims by guarding against the dangers of chilling attorney zeal or discouraging attorney creativity. The "improper purpose" requirement for an objectively colorable claim preserves the attorney's duty to represent a client zealously within the bounds of the law while shielding the attorney from the fear of sanctions for asserting a novel legal theory.

The "negligent conduct" standard and the "reckless conduct" standard are less well suited for application to objectively colorable claims because neither standard necessitates a finding of an improper purpose. Without this requirement of willful bad faith, an attorney might be hesitant to assert a novel legal theory or present a case in a zealous manner, for fear of being sanctioned if increased costs or delays result from his or her actions. Although the statute seeks to deter conduct that causes needless delay and increased

costs, it is not desirable to interpret the statute in a manner that impinges on an attorney's ethical duty to represent a client zealously within the bounds of the law. For an objectively colorable claim, requiring a finding of willful bad faith before a section 1927 sanction may be imposed insures that an attorney's ethical duty to represent a client zealously will not be jeopardized.

IV. CONCLUSION

At present, there is no uniform standard by which to assess whether an attorney has multiplied the proceedings "unreasonably and vexatiously" within the meaning of 28 U.S.C. § 1927. A sanction for culpable conduct cannot be an effective deterrent unless the judicial system imposes the sanction under conditions that are commonly understood and consistently applied. The ideal standard for the imposition of sanctions under section 1927 is a standard that fosters the legislative goals of punishment and deterrence without chilling an attorney's legitimate ethical objective of zealous representation within the bounds of the law and without discouraging the assertion of novel or innovative legal theories. The "reckless conduct" standard for objectively noncolorable claims and the "willful bad faith" standard for objectively colorable claims fulfill these requirements.

Without a clear standard for assessing sanctionable behavior, section 1927 of the Judicial Code produces consequences similar to those of the Song of the Sirens in Homer's *Odyssey*. The Sirens sing a song of temptation from atop a dangerous cliff. The song tempts unknowing sailors to alter their course toward the source of the music, only to be dashed upon the rocks. Odysseus is able to avoid a similar fate only because Circe has warned him of the particular behavior that the temptation will engender and warned him of the severity of the consequences of that behavior. Although Odysseus believes that the only way to avoid the temptation is to plug the ears of his crew and to bind himself to the mast, it is unlikely that an attorney seeking to avoid a section 1927 sanction would need to go to such extremes if the courts applied the standard for assessing sanctionable conduct under the statute in a clear and consistent manner.

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